SUPREME COURT, U. S.

FILED

JUN 20 1972

NO. 71-1344

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1971

MICHAEL DE TORE, a/k/a
MICHAEL HAYS, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

# PETITIONER'S REPLY BRIEF

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June 14, 1972

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## ARGUMENT *

### I

### THE GOVERNMENT HAS MISCONCEIVED, MISSTATED AND FAILED TO DEAL WITH QUESTION "1" OF THE "QUESTIONS PRESENTED" IN THE PETITION, AND HAS ALSO FAILED TO RESPOND TO PETITIONER'S ARGUMENT THAT A WRIT SHOULD ISSUE AS TO SAID QUESTION

(replying to the government's brief, pp. 5-6; "ARGUMENT 1.")

Question "1" of the "QUESTIONS PRESENTED" in the petition (petition, pp. 4-5), as well as the facts in connection therewith (ibid, pp. 21, 33-37, to be read with pp. 16-19, 21-28), together with the argument based thereon (ibid, pp. 37-38, 40-41, to be read with pp. 11-

*The case, as the prosecutor admitted, turned on the credibility of the witnesses (500, 485-486; see also Charge: A-22 to A-25).

16), presents the issue of the constitutionality (under the due process clause) of the common, everyday practice followed in all federal, as well as state, courts throughout the country, of deferring the sentencing of a defendant who has pleaded guilty, but has agreed to testify against a co-defendant or co-defendants, until after he has testified and the trial has been concluded, with the result that the trial jury, in determining whether or not the guilty-pleading defendant has been promised consideration, at the time of sentencing, for his cooperation, and has thus weighted his testimony in favor of the prosecution, is deprived of information relevant and material to said issue - namely, the nature and extent of the sentence ultimately imposed upon the guilty-pleading defendant, and the relationship of that sentence to the punishment which can be visited upon him.

The practice described above involves an extraordinary anomaly, which, in turn - and we say this with the utmost deference - amounts to the perpetration, by both the Court accepting the plea and the prosecutor, upon the jury deciding the fate of the co-defendant or co-defendants, of a species of fraud.* That anomaly and fraud consist in the following diametrically opposed facts, respectively labeled "(a)" and "(b)".

(a) The sentencing of the guilty-pleading defendant is so deferred because neither the Court accepting the plea nor the prosecutor trusts the guilty-pleading defendant, if he is sentenced before the trial of his co-defendant or co-defendants, to carry out his promise to testify, and to do so adversely to his co-defendant or co-defendants; that is, the Court and prosecutor consider the said

* Petition, pp. 37-38

promise of the guilty-pleading defendant, if he is sentenced before said trial, unworthy of belief (petition, p. 37).

(b) On the other hand, at the trial of the co-defendant or co-defendants, the guilty-pleading defendant, as well as his testimony, is represented to the jury - by at least the prosecutor - as being worthy of belief (petition, p. 38).

The Jekyll-and-Hyde practice, we respectfully submit, thus amounts to the perpetration, by both the Court accepting the plea and the prosecutor, upon the jury weighing the fate of the co-defendant or co-defendants, of a species of fraud. Otherwise, why not sentence the guilty-pleading defendant prior to the trial of the co-defendant or co-defendants?

The only proper course is to require that the guilty-pleading defendant be sentenced prior to the trial of the

co-defendant or co-defendants.. If the guilty plea is not offered and accepted until the trial is under way, sentence should be imposed before the guilty-pleading defendant takes the stand to testify against the co-defendant or co-defendants.

Only in this way, can the jury be enabled to determine, with all the relevant facts in its possession, the question whether the guilty-pleading defendant has been promised consideration, at the time of sentencing, for his cooperation, and has thus weighted his testimony in favor of the prosecution.

Completely and utterly misconceiving the question presented, as well as the thrust of petitioner's position, as stated above, the government asserts that petitioner is contending merely

(a) that, in the circumstances presented, the truthfulness of the testimony of the guilty-pleading defendant is so suspect - presumably, as a matter of law - as to amount to a denial to the co-defendant or co-defendants on trial of a fair trial, because (1) the guilty-pleading defendant expects to receive consideration, at the time of sentencing, in exchange for testifying, and (2) he has not yet been sentenced (government's brief, "Argument 1.", pp. 5-6).

Manifestly, the government's statement of the question presented, as well as of petitioner's contention or contentions, is egregiously wide of the mark, and does not reflect, in the slightest degree, the question or petitioner's contentions.

Put differently, the government

(a) that, in the circumstances presented, the truthfulness of the testimony of the guilty-pleading defendant is so suspect - presumably, as a matter of law - as to amount to a denial to the co-defendant or co-defendants on trial of a fair trial, because (1) the guilty-pleading defendant expects to receive consideration, at the time of sentencing, in exchange for testifying, and (2) he has not yet been sentenced (government's brief, "Argument 1.", pp. 5-6).

Manifestly, the government's statement of the question presented, as well as of petitioner's contention or contentions, is egregiously wide of the mark, and does not reflect, in the slightest degree, the question or petitioner's contentions.

Put differently, the government

has misconceived and misstated the question and petitioner's contentions. Compare Question "1", petition, pp. 4-5; 37-38, 40-41, with government's brief, pp. 5-6, "Argument 1".

Moreover, not only has the government misconceived and misstated the question presented, as well as petitioner's argument, but, in doing so, it has also failed to deal with the question, as well as petitioner's argument, and thus has failed to answer the reasons advanced by petitioner why a writ should issue as to said question, particularly in view of the fact that the practice described is such a common and widespread one, followed every day in criminal cases, by all federal, as well as state, courts throughout the country, and involves the anomaly and fraud - described at pp. 4-5, supra - consisting in the Court and prosecutor, on the one hand, believing the guilty-pleading defendant unworthy of belief (witness the deferment of his sentencing), but, on the other hand, representing him to the trial jury as worthy of belief.

THE FACTS INVOLVED IN QUESTION "1" WERE CALLED TO THE ATTENTION OF THE COURT OF APPEALS BY PETITIONER

(in further support of granting the writ as to Question "2").

Question "2" of "Questions Presented" in the petition reads as follows:

"2. Whether the violation of the due process clause referred to in '1' above amounts to 'plain error' 'affecting' the 'substantial rights' of a defendant, within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure, which a Court of Appeals may notice, as well as 'plain error', within the meaning of Rule

40(1)(d)(2) of the Rules of this Court, which this Court may notice."

The facts involved in Question "1" (see petition, pp. 21, 34-38) were called to the attention of the Court of Appeals by petitioner ("APPELLANT'S BRIEF" - principal brief - in that Court, pp. 3 and 4).

II

CONTRARY TO THE GOVERNMENT'S CONTENTION OR SUGGESTION, THE ERROR COMMITTED BY THE TRIAL COURT' , INCALCULABLY PREJUDICIAL TO PETITIONER, IN ADVISING PETITIONER'S COUNSEL, AT THE "MIRANDA" HEARING, THAT IT WOULD NOT BELIEVE ANYTHING THE DEFENDANT MIGHT SAY AT THE HEARING - SO THAT IT WAS FUTILE FOR PETITIONER TO TAKE THE STAND, AND,ACCORDINGLY, HE DID NOT DO SO - WAS NOT CURED BY THE FACT THAT PETITIONER HAD PREVIOUSLY, DURING CROSS-EXAMINATION, TESTIFIED THAT HE HAD NOT BEEN ADVISED OF HIS "MIRANDA" RIGHTS

(replying to the government's brief, pp. 7-8; "ARGUMENT 2",

and in further support of question "3b" and "3c" of the "QUESTIONS PRESENTED" in the petition).

Expressly acknowledging that the trial court, at the "Miranda" hearing, advised petitioner's counsel that it would not believe anything petitioner might say at the hearing (brief, pp. 7-8) - with the result that it was futile for petitioner to take the stand, and, accordingly, he did not do so (petitioner, pp. 30-31), the government nevertheless contends, or suggests (brief, p. 8; in answer to petition, questions "3a" and "3b", pp. 5-7; and pp. 29-31), that the trial court's error, for such it clearly was (and one that was incalculably prejudicial to petitioner), was cured by the fact that petitioner had previously, during cross-examination, (as the record indi-

cates, 399, although the government's brief misstates the record, brief, p. 8; and see next paragraph), denied that he had been advised of his "Miranda" rights (brief, p. 8) - testimony, of course, which the Court heard and disbelieved, in accordance not only with his statements to petitioner's counsel concerning the Court's refusal to give credence to anything petitioner might say, but also in accordance with the Court's ruling, at the conclusion of the Miranda hearing - at which the only witness was the government Agent Long, who testified that he had advised petitioner of his Miranda rights (petition, p. 31; government's brief, p. 8, first - and incomplete - paragraph) - that Agent Long had advised petitioner of his "Miranda" rights (444-445).

Before we set forth the reasons

why the government's contention is without merit, we are required to call the attention of the Court to the fact that the government's brief does not accurately reflect petitioner's testimony, given during his cross-examination, concerning the question whether he had been advised of his "Miranda" rights. The government's brief alleges, first, that

> "Petitioner then testified that he did not remember if he had been advised of his rights by Agent Long (T 398-401.)" (Brief, p. 7).

and, secondly, that

> ".....petitioner testified during cross-examination that he could not remember if Agent Long had advised him of his rights." (Brief,

p. 8).

Each of the foregoing statements of petitioner's testimony is egregiously inaccurate. What petitioner testified to, in response to a question by the prosecutor as to whether or not he remembered Agent Long's having shown him an Advice of Rights form, enumerating certain specified rights, was that he did not remember Agent Long's having done so (399). The "Advice of Rights" form is Government's Exhibit 18 in evidence (admitted, 440-441), and is reproduced in the volume of "Exhibits" which petitioner filed with the Court of Appeals in support of his appeal (p. E-2).

Returning now to the government's suggestion or contention that

the trial court's error was cured by the fact that petitioner had testified, during cross-examination - as the record shows (399) - that he had not been advised of his "Miranda" rights (brief, p. 8), the government's suggestion or contention is without merit. For petitioner was entitled, at the Miranda hearing, to testify and to have the Court consider not only (a) his denial that Agent Long had advised him of his Miranda rights, but also (b) petitioner's testimony at said hearing concerning all the circumstances surrounding Agent Long's allegedly having advised him of his rights. As indicated, the trial court did not accord petitioner said right. This was, admittedly, towering error.

III

THE SILENCE OF THE GOVERNMENT'S BRIEF CONCERNING THE UNDISPUTED FACT THAT AGENT LONG, IN HIS REBUTTAL TESTIMONY BEFORE THE JURY, FAILED TO GIVE ANY EVIDENCE THAT PRIOR TO PETITIONER'S MAKING HIS ALLEGED STATEMENTS TO LONG (CONCERNING WHICH LONG TESTIFIED IN HIS REBUTTAL TESTIMONY BEFORE THE JURY), PETITIONER HAD EITHER INDICATED THAT HE UNDERSTOOD THE "ADVICE OF RIGHTS" FORM ALLEGEDLY SHOWN TO HIM BY LONG (THE ONLY WAY IN WHICH, LONG CLAIMED, HE ADVISED PETITIONER OF HIS "MIRANDA"

RIGHTS), OR HAD WAIVED HIS RIGHTS WITH RESPECT TO SAID "MIRANDA" RIGHTS (in further support of petition, questions "3d" and "3e" of the "QUESTIONS PRESENTED"; petition, pp. 5-7, 32).

The government's brief is silent concerning the undisputed fact, set forth in the petition (p. 32), that Agent Long, in his rebuttal testimony before the jury, failed to give any evidence - evidence required before petitioner's alleged statements to Long could be admitted as part of the government's case, and considered by the jury (Miranda v. Arizona, 384 U.S. 436, 475-476; Harris v. New York, 401 U.S. 222) - that petitioner, prior to making said alleged statements to Long, either indicated that he understood the "Advice of Rights" form allegedly shown to

him by Long (the only way in which, Long claimed, he advised petitioner of his "Miranda" rights)*, or waived his rights with respect to said "Miranda" rights.

Notwithstanding this fatal omission in Long's rebuttal testimony, the Court permitted Long to testify before the jury to statements petitioner allegedly had made to Long (453-457), and also instructed the jury that they should consider such evidence (A-23).

All this was unmistakable error, seriously prejudicial to petitioner, Miranda v. Arizona, supra, 384 U.S., at pp. 475-476; Harris v. New York, supra, 401 U.S. 222.

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* see 451-452

## IV

## PETITIONER'S SILENCE WITH RESPECT TO OTHER PORTIONS OF THE GOVERNMENT'S BRIEF.

Petitioner's silence with respect to other portions of the government's brief is not to be taken as signifying acquiescence by petitioner in the correctness of the government's arguments or conclusions. These other portions do not raise new matter requiring reply.

## CONCLUSION

For all the reasons stated in the petition and herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

THEODORE L. MALATESTA
Counsel for petitioner

## Certificate of Service

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I hereby certify that on the day of June, 1972, three copies of the within Petitioner's Reply Brief were forwarded, via United States mail, postage prepaid, to Hon. Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

I further certify that all parties required to be served have been

served.

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